

**SANITIZED DECISION -- 05-222 C -- BY GEORGE V. PIPER, ALJ -- SUBMITTED
for DECISION on JUNE 8, 2006 -- ISSUED on JUNE 26, 2006**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, taxpayer's defense that he was not informed by the State Tax Commissioner's Office that certain of his services were indeed subject to collection of consumers' sales and service tax does not meet the burden of proof requirement that Petitioner must show that the assessment against it is erroneous, unlawful, void or otherwise invalid. See W.Va. Code § 11-10A-10(e) [2002]; W.Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

FINAL DECISION

A tax examiner with the Field Auditing Division ("the Division") of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent") conducted an audit of the books and records of the Petitioner. Thereafter, on March 4, 2005, the Director of this Division of the Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period of January 1, 2002 through December 31, 2004, for tax of \$, interest, through April 30, 2005, of \$, and no additions to tax, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked May 3, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2002].

Subsequently, notice of a hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and 121 C.S.R. 1, § 63.3.3 (Apr.20, 2003).

FINDINGS OF FACT

1. Petitioner operates a funeral home in West Virginia.
2. During the audit period Petitioner collected consumers' sales and service tax on each and every item of tangible personal property that he sold to customers; however, it failed to collect consumers' sales and service tax on its non-professional services.
3. During the conduct of her audit, the tax auditor followed exactly the provisions of Technical Assistance Advisory 95-002, which established a safe harbor rule whereby West Virginia funeral directors are allowed to calculate West Virginia consumers' sales and service on seventy (70%) percent of total charges, with the remaining thirty (30%) percent deemed to be non-taxable.
4. Petitioner's testimony at hearing was to the effect that he had never been informed by Respondent that he was required to collect consumers' sales and service tax on services because all services were considered by him to be tax exempt.

DISCUSSION

The sole issue is whether the Petitioner has shown that the assessment is incorrect and contrary to law, in whole or in part.

At the hearing, Petitioner's only defense was that he was never told by the State Tax Commissioner's Office that certain of his services were subject to consumers' sales and service tax or that a safe harbor rule was even in effect for funeral directors.

It is well settled that it is not Respondent's obligation to make sure that each and every taxpayer is personally and directly notified as to what is and what is not taxable, so long as that information is made generally available to taxpayers.

Accordingly, it is Determined that Petitioner's failure to discover what services which it rendered were subject to collection of consumers' sales and service tax does not meet the burden of proof required to show the assessment against it is erroneous or otherwise invalid.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to its contention that it was not liable for consumers' sales and service tax on certain non-exempt services which it performed in connection with the operation of the funeral home.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the period of January 1, 2002 through December 31, 2004, for tax of \$, interest of \$, and no additions to tax, **totaling \$**, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this tax assessment until this liability is fully paid.